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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY, OHIO

T. L. BLACKBURN	*	
	*	
Plaintiff-Appellant	*	Case No. 2021
vs.	*	
	*	
REBECCA TUDOR	*	
	*	
Defendant-Appellee	*	

MOTION TO DISMISS NOTICE OF APPEAL AND MOTION FOR DAMAGES FOR DELAY PURSUANT TO RULE 23, RULES OF APPELLATE PROCEDURE

BRANCH ONE

Defendant-appellee moves the Court for an order dismissing the *Notice Of Appeal* filed June 21, 1993.

This case was tried to the trial court on October 30, 1991. A Judgment Entry adverse to plaintiff-appellant was rendered and filed November 18, 1991, (Exhibit "A" attached hereto). Plaintiff-appellant timely filed a notice of appeal. The Court of Appeals issued a *Decision and Judgment Entry* (Exhibit "B" attached hereto) on September 25, 1992, reversing the trial court's decision and judgment entry and remanding the case to the trial court for a redetermination of the case without taking judicial notice of certain "evidence".

On October 16, 1992, the trial court issued its *Revised Judgment Entry* (Exhibit "C" attached hereto) again finding in favor of defendant-appellee. On October 19, 1992,

plaintiff-appellant filed a *Notice of Appeal To The Supreme Court Of Ohio* (Exhibit "D" attached hereto).

By entry dated February 10, 1993, (Exhibit "E" attached hereto) The Supreme Court of Ohio overruled plaintiff-appellant's motion to have the Court of Appeals record certified.

Plaintiff-appellant next asked The Supreme Court of The United States for a writ of certiorari to the Court of Appeals of Ohio, Scioto County. This petition was denied by entry dated June 14, 1993, (Exhibit "F" attached hereto).

Plaintiff-appellant has now filed a *Notice of Appeal* apparently attempting to appeal the *Revised Judgment Entry* which was filed three days before the original notice of appeal. The trial court judgment entries of October 30, 1991, and October 16, 1992, must be construed together. Plaintiff-appellant obviously cannot appeal one entry and not the other thereby "saving" the second entry for a second round of appeal if unsuccessful on the first appeal. Rule 4(A), Rules of Appellate Procedure provides in part:

> A Party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) Of the Ohio Rules of Civil Procedure.

Plaintiff-appellant has appealed a judgment entry previously appealed. Additionally, the notice of appeal

was filed nearly eight months after the entry being appealed.

BRANCH TWO

Rule 23 (*Damages For Delay*) provides that if a court of appeals determines that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs.

Defendant-appellee submits that this attempted "appeal" is frivolous. Plaintiff-appellant has exhausted all appellate procedures. It is defendant-appellee's belief that this frivolous "appeal" has been attempted because defendant-appellee entered into a purchase agreement for the sale of the real property in question (Exhibit "G" attached hereto) which must be consummated by July 26, 1993. Plaintiff-appellant's "appeal" has no legal basis and is an effort to create a cloud on the title to the real property.

Defendant-appellee respectfully requests that the notice of appeal be dismissed and that plaintiff-appellant be ordered to pay defendant-appellee's attorney fees and costs.

/s/ Stanley C. Bender
Stanley C. Bender (#0012323)
402 Bank One Plaza
P. O. Box 950
Portsmouth, OH 45662
(614) 353-4191
Attorney for Defendant-Appellee

PROOF OF SERVICE

A copy of the foregoing was served upon Cynthia K. Gerlach, attorney for plaintiff-appellant, 814 Seventh Street, Portsmouth, Ohio 45662, by personal service this 22nd day of June, 1993.

/s/ Stanley C. Bender
Stanley C. Bender

COURT OF COMMON PLEAS, SCIOTO COUNTY, OHIO

Thomas L. Blackburn, Plaintiff	:	Case No. 91-CI-136
-vs-	:	JUDGMENT ENTRY
Rebecca L. Tudor, Defendant	:	(Filed Nov. 18, 1991)

This cause came on for trial, both parties being present with counsel and both parties having presented evidence to the Court. Upon consideration of such evidence, exhibits, etc., the Court finds as follows:

FACTS

Plaintiff was a successful contractor in Portsmouth, Ohio. His wife of many years was Caroline Blackburn. Within the last three or four years, plaintiff met defendant Rebecca Tudor, an unmarried woman many years

his junior. Mr. Blackburn became enamored with Rebecca Tudor's charms. He began dating her, then sleeping with her, and finally left his wife and moved in with defendant. The plaintiff Mr. Blackburn then filed suit for divorce; in fact, he filed twice. Defendant Tudor thought that the plaintiff did not intend to marry her but wanted a mistress. As a condition to the continuation of the relationship, she demanded a house, a car and an engagement and wedding ring. Plaintiff Blackburn provided defendant Tudor with a car and the rings. He surreptitiously purchased the house in question in this case and put the deed in defendant Tudor's name. His divorce was then pending and he did not want this property considered as a martial asset. In fact, during the divorce hearing, under oath, he denied any ownership or interest in the property, and in fact, the asset was not considered by the Judge in dividing the marital property. (That Judge, incidentally, was the same Judge as the Judge in this case).

After plaintiff Blackburn had the deed made to defendant Tudor, he did not immediately give it to her, but gave it to her stepfather to hold pending certain conditions, one of which was the outcome of the divorce case. The defendant's mother, however, found the deed and gave it to her daughter, Rebecca Tudor, who had it recorded.

The relationship between the plaintiff and the defendant was rather stormy, and after some arguments, the plaintiff finally moved out of the house and the defendant immediately had the locks changed. She also filed the deed for recording. The plaintiff and defendant were

never reconciled after plaintiff's divorce. When the plaintiff found out defendant Tudor had filed the deed, he commenced this equitable action requesting the Court to declare the delivery of the deed invalid and that the transfer be set aside.

LAW

There are several reasons why the plaintiff cannot prevail. He has no legal cause of action, for he is not in the chain of title. The deed was made exactly as he directed. His complaint is basically against the Springers for delivering the deed without following his instructions. However, the Springers are not parties to this action and the Court cannot speculate as to any cause of action that might exist against them.

Has the plaintiff produced a preponderance of evidence to indicate he is entitled to some equitable relief? I think not. The maxim that one requesting equity should come into Court with clean hands is very applicable here.

The plaintiff left his wife and ruined his marriage because of the defendant. He basically tried to buy the defendant's affection. When she had received the quid pro quo for the relationship, she terminated it. Plaintiff attempted to deceive his wife, possibly the bankruptcy authorities, and the Court in the divorce case, and now wants the Court to reward his indiscretions by giving the property back after the title already had vested in his girlfriend's name. I assume that if the plaintiff and defendant had not had their falling out, the plaintiff would be satisfied with the situation and this case never would have been filed.

It might be pointed out that if the plaintiff was entitled to the property, his former wife would have a claim against fifty percent of the same as a marital asset.

However, for the reasons given above, the Court cannot grant any legal or equitable relief to this plaintiff.

Judgment is hereby granted to the defendant and costs assessed against the plaintiff. No further entry is required.

/s/ T. W. Mitchell
T. W. Mitchell,
Judge (Retired)
By Assignment

IN THE COURT OF COMMON PLEAS,
GENERAL DIVISION, SCIOTO COUNTY,
PORTSMOUTH, OHIO

THOMAS L. BLACKBURN, Plaintiff	:	Case No. 91-CI-136
VS.	:	JOURNAL ENTRY
REBECCA L. TUDOR, Defendant	:	(Filed Dec. 4, 1991)

This cause comes to the Court upon a Motion For New Trial filed by the Plaintiff herein on November 26, 1991.

The Court having considered the Motion finds said Motion not well taken and the same is hereby ORDERED denied.

ENTER: December 4, 1991.

/s/ Thomas W. Mitchell
THOMAS W. MITCHELL,
JUDGE

cc:
Cynthia K. Gerlach
Attorney for Plaintiff

McCurdy, Johnson, Ruggiero,
McKenzie & Bender
Attn: Stanley C. Bender
Attorney for Defendant

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Thomas L. Blackburn	:	Case No. 2021
Plaintiff-Appellant	:	DECISION AND JUDGMENT ENTRY
vs.	:	
Rebecca L. Tudor	:	
Defendant-Appellee	:	

APPEARANCES

Gerlach, Gerlach, and Gerlach, Ms. Cynthia Koehler Gerlach, Portsmouth, Ohio, for Appellant.

McCurdy, Johnson, Ruggiero, McKenzie & Bender, Mr. Stanley C. Bender, Portsmouth, Ohio for Appellee.

Harsha, J.:

Thomas L. Blackburn, plaintiff-appellant, appeals from a judgment entered by the Scioto County Court of Common Pleas finding in favor of Rebecca L. Tudor, defendant-appellee, on Blackburn's complaint which requested that the purported delivery of a deed to certain property to Tudor be declared invalid and that the filing of the deed and the conveyance represented by the deed be set aside and canceled.

Appellant assigns the following errors:

I. THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT WHICH ARE AGAINST

THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT SHOULD HAVE GRANTED JUDGMENT TO PLAINTIFF-APPELLANT IN ACCORDANCE WITH EQUITY.

III. THE TRIAL COURT ERRED IN PERMITTING VIOLET COX-FAIN TO TESTIFY REGARDING PRIVILEGED COMMUNICATIONS WITH PLAINTIFF-APPELLANT.

IV. THE TRIAL COURT ERRED IN FAILING TO ALLOW APPELLANT TO AMEND HIS COMPLAINT.

On April 8, 1991, appellant filed a complaint which averred the following. On October 20, 1989, appellant purchased real and personal property from Ronald and Phyllis Lauder who upon appellant's direction executed a deed to appellee, as grantee, for the real property. On July 12, 1990, appellant delivered this deed to Claude Springer as escrow agent with instructions that the deed would be delivered to appellee only if appellant should die or not get divorced by July 12, 1991. Appellee, in a manner unknown to appellant, obtained possession of the deed and had it recorded on January 28, 1991. Appellant's complaint asserted that he had no adequate legal remedy and that he should obtain equitable relief declaring the delivery of the deed to appellee invalid and setting aside the conveyance of real property to appellee. Appellee subsequently filed an answer which contended, in part, that appellant was "estopped from seeking equitable relief because he has attempted to defraud both defendant and the court."

Two trial court judges recused themselves upon motions of appellant. Appellant's second recusal motion explicitly requested that the case be heard by the same judge who had presided over appellant's divorce case in Case No. 90-DR-306 in part, because that judge was familiar with the "property issue." The case was then so assigned.

A bench trial was subsequently held upon appellant's complaint for equitable relief, and the following, pertinent evidence was adduced. Appellant owns and operates T.L. Blackburn Construction Company. He was married to Carolyn Blackburn. In July of 1987, he engaged in an extramarital affair with appellee. In 1988, appellant left his wife and moved into an apartment he owned in Portsmouth while he continued his relationship with appellee. In September 1989, appellee ended her relationship with appellant because he had not yet divorced his wife. According to appellee, appellant promised to buy her a house, a car, an engagement ring, and a wedding ring if she resumed their relationship. Appellant testified that he only promised appellee these things if and when they got married. Violet Cox-Fain, a licensed independent social worker and a licensed professional counselor, testified that she conducted joint counseling sessions with appellant and appellee in late September and early October of 1989 and that during these meetings, appellant told appellee that if she would continue their relationship, he would purchase her a house and a car.

On October 2, 1989, appellant purchased an engagement ring and a wedding ring and gave them to appellee. Thereafter, appellee and her mother advised him that

they had found a house located at 5270 Oakland Boulevard, Sciotoville, Ohio. Appellant paid for a title search and a survey of the property, and on October 19, 1989, he borrowed $90,000 from a bank in Portsmouth. On October 20, 1989, he went to Ironton, Ohio and had an attorney prepare a deed to the real property from Ronald and Phyllis Lauder to appellee. The purchase price was $82,000. Appellant then had his secretary, Glenda Willis, prepare a second deed which listed himself as grantee. The deeds were executed by Ronald and Phyllis Lauder in South Point, Ohio at a closing which appellant arranged and attended. Appellee was not present at the closing.

Appellant then gave the original deeds to his secretary with instructions not to release the deeds to anyone but him. On October 21, 1989, appellant gave appellee the keys to the house and she and appellant moved in. The utilities were all placed in appellee's name. On November 2, 1989, appellant filed for a divorce from his wife. In December of 1989, appellant leased a GEO Tracker automobile and gave it to appellee to use. The parties, relationship became strained because appellee was constantly asking that appellant record the deed or give her the deed. Appellee was unaware of appellant's other deed which listed himself as grantee.

In April 1990, the parties had a fight and appellant voluntarily moved out of the subject property. Marilyn Springer, appellee's mother, then moved in with appellee at the Sciotoville property. Appellant moved back to his marital domicile and attempted a reconciliation with his wife. On April 27, 1990, appellant dismissed his previously filed divorce complaint. When the reconciliation

failed, appellant moved back to his Portsmouth apartment and attempted to resume his relationship with appellee. On June 19, 1990, appellant filed a second divorce complaint.

According to appellant's testimony, appellee told him that if he gave the deed to the property with appellee's name as grantee to appellee's stepfather, Claude Springer, to hold for him, then appellant could move back in with appellee and try to work things out. On July 11 or 12, 1990, appellant took the original deed naming appellee as grantee from his secretary and gave it to Claude Springer to hold for appellant's benefit. Both appellant and Claude Springer testified that the deed was only to be transferred to appellee or recorded if: (1) appellant was not divorced by July 12, 1991 or (2) appellant died. Neither of these conditions occurred. Appellant moved back into the Sciotoville property with appellee and her mother.

On October 29, 1990, his wife's divorce attorney took appellant's deposition in the context of the divorce proceeding. A pretrial statement listed the Sciotoville property as an asset purchased in October of 1989 and that it was to be appellant's "future home." When questioned about the property by his wife's attorney, appellant testified that he had no ownership interest in the property, that he had purchased it for appellee, and that the deed was made out to appellee. Appellant did not state in the deposition that he had directed the execution of another deed to the property in his own name. Appellant testified at trial in the case at bar that he had the deed to appellee drafted in Ironton because he did not want his wife to know about it and that if he went bankrupt, there was a "possibility" that he might want to keep the bankruptcy

court from finding out about it. Conversely, appellant further testified that he told his wife prior to the divorce trial about the two deeds and the Sciotoville property and that he never anticipated and never, in fact, filed for bankruptcy.

In January of 1991, the parties again had a physical fight, and, once again, appellant voluntarily moved out of the Sciotoville property. Without either appellant or Claude Springer's knowledge or consent, Marilyn Springer took the deed naming appellee as grantee of the Sciotoville property from Claude Springer's safe and gave it to appellee, who caused the deed to be filed on January 28, 1991. Appellant lost the deed made out to himself as grantee and, consequently, never filed it. Appellee testified that appellant gave her the deed for a brief period on February 15, 1990, but he took it back shortly thereafter. Appellee admitted that she ultimately got the deed when her mother took the deed from the safe in which Claude Springer had placed it.

On November 15, 1991, the trial court entered a judgment in appellee's favor on the basis that appellant had no legal cause of action and did not come to court with clean hands so as to entitle him to equitable relief. Appellant subsequently filed a motion for new trial with an attached affidavit of his ex-wife stating that she knew as early as April of 1990 about appellee's purchase of the Sciotoville property. The trial court overruled appellant's motion on December 4, 1991.

Appellant's first assignment of error asserts that the trial court's findings of fact in denying his claim for equitable relief were against the manifest weight of the

evidence. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *State, ex rel. Pizza, v. Strope* (1990), 54 Ohio St. 3d 41, 46; see, also, *Eberly v. A-P Controls, Inc.* (1991), 61 Ohio St. 3d 27, 30.

In the trial court's journal entry of November 15, 1991, it specifically listed under its heading "FACTS" the following:

> * * * He surreptitiously purchased the house in question in this case and put the deed in defendant Tudor's name. His divorce was then pending and he did not want this property considered as a marital asset. *In fact, during the divorce hearing, under oath, he denied any ownership or interest in the property, and in fact, the asset was not considered by the Judge in dividing the marital property. (That Judge, incidentally, was the same Judge as the Judge in this case).*

(Emphasis added.)

Appellant specifically contends on appeal that the foregoing finding of fact, *i.e.*, what occurred at his divorce trial, was unsupported by evidence in the case at bar. On May 22, 1991, the trial court in the divorce case sealed the record on appellant's motion based on appellant's representation that it would affect his financial condition and his business if his competitors obtained information contained in the divorce proceedings. On May 29, 1991, appellee filed a mistitled "MOTION IN LIMINE" which actually sought court approval to utilize appellant's pretrial deposition in the divorce trial to "show that Blackburn previously denied, under oath, ownership of the

property he now claims to own." At trial in the instant case, the trial court granted appellee's motion and allowed utilization of evidence from the divorce proceedings regarding the Sciotoville property, and further stated as follows:

> * * * Actually it just so happens that you have the same Judge now as you had in that action. And I couldn't divorce that particular testimony from my mind anyway. If you know what I mean. And if it has any relevance in this case I'll so consider it. * * *

During the trial, although appellant testified on cross-examination about answers he gave during a pretrial deposition in the divorce case, there was no evidence that such deposition was subsequently introduced into evidence at the divorce trial or that appellant testified at the divorce trial that he had no ownership or interest in the Sciotoville property. Therefore, it is apparent that the trial court, in effect, took judicial notice of the prior divorce proceeding which it had presided over.

However, the rule is well established in Ohio that trial courts may not take judicial notice of their own proceedings in other cases, even though the same trial judge may have presided. *Myers v. State* (1889), 46 Ohio St. 473; *State, ex rel. Crow, v. Weygandt* (1959), 170 Ohio St. 81; *In the Matter of Pyle* (May 6, 1992), Belmont App. No. 91-B-27, unreported; *Kerns v. Mansfield* (Dec. 15, 1989), Logan App. No. 8-87-20, unreported. Therefore, a trial court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of prior proceedings in the immediate case. *Diversified Mortgage Investors, Inc. v. Bd. of Revision* (1982), 7 Ohio App. 3d 157;

see *State v. Bialek* (Feb. 17, 1992), Montgomery App. No. 12323, unreported, where the appellate court noted that adoption of Evid. R. 201 has not modified the foregoing precedent. The rationale for these holdings is that when judicial notice is taken of prior proceedings, such prior proceedings are not part of the record as defined in App. R. 9, and whether the trial court correctly interpreted such prior proceedings is not reviewable by the appellate court. *Accord v. Accord* (April 22, 1981), Pike App. No. 329, unreported.

Based on the foregoing, the trial court's findings of fact relating to the "divorce hearing" and its divorce decree were not supported by competent, credible evidence and, consequently, were against the manifest weight of the evidence. Nevertheless, in order to support a reversal of a judgment, the record must show affirmatively not only that error intervened but that such error was to the prejudice of the party seeking such reversal. *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co.* (1986), 26 Ohio St. 3d 15, 18; *Lowry v. Lowry* (1988), 48 Ohio App. 3d 184, 190. The "harmless error" rule of Civ. R. 61 requires courts to disregard errors which do not affect the substantial rights of the parties. *Rouse v. Rouse* (July 8, 1991), Jackson App. No. 653, unreported.

Here, the record affirmatively indicates that the trial court erroneously relied upon evidence which was not properly introduced in the case. Moreover, it placed special emphasis on the improperly considered evidence in its judgment entry which determined that appellant was not entitled to equitable relief. Although other evidence properly introduced at trial would have supported the trial court's ultimate conclusion, see our discussion and

disposition of appellant's second assignment of error, *infra*, we may not resume that the erroneous taking of judicial notice of evidence was harmless, *i.e.*, that the trial court in exercising its discretion without the improper evidence necessarily would have reached the same conclusion. Cf., *e.g.*, *Spencer v. Spencer* (April 29, 1991), Clark App. No. 2724, unreported (trial court's factual error not harmless although, without the error, it would have been within its discretion to reach the same judgment and where the record affirmatively indicated such factual error). Appellant's first assignment of error is sustained.

Appellant's second assignment of error asserts that the trial court erred in denying him equitable relief. The trial court determined that appellant was not entitled to equitable relief because he did not come to court with clean hands. Appellant contends that several facts manifested his intention not to relinquish control of the deed and that appellant obtained possession of the deed through no fault of his own. The essential elements of a valid gift *inter vivos* are: (1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2) in pursuance of this intention, a delivery by the donor to the donee of the subject matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion and control over it. *Bolles v. The Toledo Trust Co.* (1936), 132 Ohio St. 21, first paragraph of the syllabus; *Dillon v. Dillon* (Dec. 6, 1991), Pickaway App. No. 90CA33, unreported. The trial court essentially found that there was no delivery of the deed to appellee from appellant but that the deed was given to

appellee's stepfather "to hold pending certain conditions." However, the trial court did not find the absence of any delivery significant because of appellant's deception regarding the Sciotoville property.

The cardinal maxim of equity jurisprudence, that he who comes into equity must come with clean hands, requires that the party seeking equitable relief not be guilty of reprehensible conduct with respect to the subject matter of the suit. *Basil v. Vincello* (1990), 50 Ohio St. 3d 185, 190; *Ossenbeck v. Calhoun & Vine Realty Co.* (Nov. 13, 1991), Hamilton App. No. C-900592, unreported; *Marinaro v. Major Indoor Soccer League* (June 19, 1991), Summit App. No. 14877, unreported. One who has acted fraudulently or acted in bad faith is not entitled to equitable relief. *Kettering v. Berger* (1982), 4 Ohio App. 3d 254, 261-262.

Appellant admits that appellee has a superior legal right to the property, by virtue of appellee's recording of the deed, but claims that he has a superior equitable right to the property since none of the conditions for delivery by his escrow agent, Claude Springer, had ever been fulfilled, (and the trial court agreed in its findings of fact), and it would be unconscionable to give appellee an $82,000 windfall. However, the foregoing would not preclude the trial court from denying equitable relief based upon the clean hands doctrine. There was evidence introduced below that appellant, while contemplating divorce, deceived his wife regarding the property and would have deceived the bankruptcy court had he filed for bankruptcy. Moreover, in a pretrial divorce deposition which he testified about below, appellant disclaimed any ownership interest in the property. Although the evidence introduced at trial could lead to different conclusions

regarding the applicability of the clean hands doctrine,[1] the trial court acted within its discretion to deny equitable relief to appellant where some evidence of reprehensible, fraudulent conduct on his part is apparent on the record. Therefore, without considering the error committed by the trial court as discussed under appellant's first assignment of error, *supra*, appellant's contentions as to a failure of delivery conditions and a windfall to appellee are meritless. Appellant's second assignment of error is overruled.

Appellant's third assignment of error asserts that the trial court erred in permitting Violet Cox-Fain to testify regarding privileged communications with appellant. Cox-Fain, a licensed independent social worker and professional counselor, testified over appellant's objection that during joint counseling sessions with the parties, appellant promised appellee that if she would continue their relationship, he would purchase her a house and car.

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[1] Appellant's testimony contradicted the foregoing as well by noting that his ex-wife was aware of his purchase of the Sciotoville property prior to the divorce (in other words, there was ultimately no deception of his wife at the time of the divorce). We emphasize that we do not condone appellee or her mother's actions in the case at bar. Moreover, we parenthetically agree with appellant's assertion on appeal that "[g]ood morals" are not necessarily co-extensive with equitable considerations. However, although we might not have reached a similar conclusion regarding the clean hands doctrine's application to the case at bar even when considering the erroneously judicially noticed evidence if we were sitting as the trier of fact, the conflicting evidence appears to support a judgment in favor of either party in the case *sub judice*.

Because the law of privilege is substantive in nature, statutory provisions control. Evid. R. 501; *State v. Smorgala* (1990), 50 Ohio St. 3d 222. The pertinent statutory provision provides that a licensed or registered professional counselor or social worker shall not testify concerning a confidential communication made to him/her by his/her client in that relation or his/her advice to the client unless:

(a) * * *

(b) The client gives express consent to the testimony.

(c) * * *

(d) *The client voluntarily testifies,* in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code and rules adopted under it may be compelled to testify on the same subject.

(e) * * *

(f) * * *

R.C. 2317.02(G)(1) (emphasis added).

Although appellee contended below and asserts on appeal that Cox-Fain's testimony was not privileged because it was made in appellee's presence, this is not one of the listed statutory exceptions, although it is a valid statutory exception to the husband-wife privilege. See R.C. 2317.02(D). Additionally, we are not persuaded that a statement made in the presence of another "client" during *joint* counseling should necessarily be deprived of the benefit of this privilege where the statute does not so provide. Nevertheless, in the case at bar, appellant voluntarily testified that he had promised appellee a house

only if they got married, and Cox-Fain's testimony properly rebutted that by specifying that appellant's promises were conditioned only upon appellees resuming their relationship. See R.C. 2317.02(G)(1)(d). Moreover, any error in the admission of CoxFain's testimony was arguably harmless where the trial court's holding was not based upon such evidence but relied instead on appellant's alleged deception to invoke the clean hands doctrine. See *In re Decker* (1984), 20 Ohio App. 3d 203 (error in admission of privileged communications was harmless error where it could not have changed the result of the trial). In that we find no error in the admission of Cox-Fain's testimony where it related to the same subject as appellant's voluntary testimony, appellant's third assignment of error is overruled.

Appellant's fourth assignment of error asserts that the trial court erred in failing to allow him to amend his complaint to add Claude and Marilyn Springer as defendants and to assert claims against them. Notice of the October 30, 1991 trial in the instant case was mailed on September 26, 1991. On September 27, 1991, appellant took the depositions of Claude and Marilyn Springer. On October 30, 1991, just prior to the commencement of the bench trial, appellant's counsel orally moved to amend the complaint to include the Springers as defendants. The trial court overruled the motion.

Civ. R. 15(A) provides in part:

(A) Amendments.

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to

> which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. * * *

A trial court's decision not to grant leave to amend a complaint will not be reversed absent an abuse of discretion. *Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co.* (1991), 60 Ohio St. 3d 120; *Solowitch v. Bennett* (1982), 8 Ohio App. 3d 115. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Wilmington, supra,* at 122. In the instant case, although appellant took depositions of the Springers on September 27, 1991, appellant waited over a month until the day of trial to orally request leave to amend the complaint, and then did not present any oral argument as to why such leave should be granted prior to the trial court's oral ruling. When a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading. *Id.*, at syllabus. Moreover, although appellant claims on appeal that he did not request a continuance of the trial based upon the deposition testimony of the Springers because he was "informed by the trial court that no continuances would be granted" and therefore he "had no choice but to wait until the morning of the trial to request that the Springers be added as parties," the record on appeal does not contain any evidence to support these contentions.

Accordingly, we find no abuse of discretion on the part of the trial court in overruling appellant's oral motion for leave to amend his complaint on the day of the trial. Appellant's fourth assignment of error is overruled.

In that we have sustained appellant's first assignment of error, the judgment is reversed and remanded to the trial court for a redetermination of appellant's complaint without considering the "evidence" it erroneously took judicial notice of concerning appellant's divorce trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

BLACKBURN V. TUDOR – SCIOTO APP. NO. 2021

Stephenson, P.J. Concurring:

I concur in the majority judgment and opinion, but write separately in order to express certain reservations. The court below opined that there were several reasons why appellant did not prevail on his claim and one of these was because "[h]e has no legal cause of action, for he is not in the chain of title." Obviously, if appellant could not have maintained a claim for canceling the deed below, then any mistake by the court in considering the previous divorce action would have been harmless error.

The results of my own research tend to support the conclusion of the trial court on this issue. As a general rule, only a party to an instrument or one in privity therewith is entitled to maintain a suit to cancel or rescind that instrument. *See* cases cited in 12A Corpus Juris Secundum (1980) 741, Cancellation of Instruments, Section 63a. Thus, the grantor in a deed is the proper party

plaintiff in a suit to cancel such document. *Id.* at 764, Section 72. This would appear to be the law in Ohio. *See Stevens v. McCoy* (1899), 60 Ohio St. 540, 548 (right of action for recision of conveyance is personal unto grantor); *also see Euclid Stores Co. v. Willard* (App. 1929), 7 Ohio Law Abs. 633, 634 (right to maintain an action for recision and cancellation of an instrument is reserved unto the parties involved in the transaction).

Although appellant executed the real estate purchase contract (introduced below as plaintiff's exhibit 3), such contract merged into the subsequent deed. *See 37 Robinwood Associates v. Health Industries, Inc.* (1988), 47 Ohio App. 3d 156, 157-158; *Medeiros v. Guardian Title & Guaranty Agency* (1978), 57 Ohio App. 2d 257, 259; *Mayer v. Sumergrade* (1960), 111 Ohio App. 237, 239. The deed at issue herein (introduced below as plaintiffs exhibit 1), reveals the Lauders as grantors and appellee as grantee. Thus, under the general rule discussed above, only these parties could maintain a cause of action to cancel or rescind the deed. Appellant was neither a party to the conveyance nor in privity with one who was and, therefore, stands outside that class of individuals generally recognized as being able to maintain such an action.

Some jurisdictions have carved cut exceptions to this general rule and allow a person who was not a party to the instrument to sue so long as he had legal or equitable rights at stake. *See* cases cited in 13 American Jurisprudence 2d (1964) 537, Cancellation of Instruments, section 54. However, I find no authority for the proposition that Ohio has embraced such an exception. Perhaps we should and perhaps we should not; there are logical arguments on both sides.

This is a nebulous area of the law and neither party has briefed this particular issue. I therefore do not base my decision on these grounds. Nevertheless, I am not fully persuaded that Ohio law allows for appellant to have maintained the action below. With this *caveat* in mind, I concur in the majority judgment and opinion.

(Blackburn v. Tudor)

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED to the trial court for further proceedings consistent with this opinion and that Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Stephenson, P.J., Concurs
with attached Concurring
Opinion.
Abele, J., Concurs in
Judgment and Opinion.

For the Court

/s/ William H. Harsha
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS
SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN
PLAINTIFF,

-vs-

REBECCA L. TUDOR,
Defendant.

CASE NO.
91-CI-136

REVISED
JUDGMENT ENTRY
(Filed Oct. 16, 1992)

* * *

This cause comes on to be heard upon a Mandate from the Court of Appeals as follows:

"In that we have sustained Appellant's first assignment of error, the Judgment is reversed and remanded to the Trial Court for a redetermination of Appellant's Complaint without considering the evidence it took Judicial Notice of concerning Appellant's former Trial."

There was no intention of the Common Pleas Court, hearing the facts in this case, to rely upon any evidence in the Appellant's former Divorce Trial as it is completely unnecessary to a Judgment in this case. An examination of Appellant's testimony in this case, on Cross Examination, reveals a pattern of deception both to his wife and also to his new girlfriend, who didn't know that he had two deeds made to the property. In *this* case he affirmed that he had previously under oath, denied any ownership in the property. It is also undisputed that the Appellant is not in the chain of title of the property. Therefore, I reaffirm my previous decision based solely upon the facts of this case as follows:

1. The Appellate was not entitled to legal relief not being in the chain of title (by his own choosing).

2. Under the facts of this case and by any existing maximum of equity, he did not have clean hands and was not entitled to equitable relief.

/s/ Thomas W. Mitchell
THOMAS W. MITCHELL, JUDGE
SITTING BY ASSIGNMENT
COMMON PLEAS COURT
SCIOTO COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN
Plaintiff-Appellant

VS.

REBECCA TUDOR
Defendant-Appellee

Case No. 2021

PLAINTIFF'S NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

(Filed Oct. 19, 1992)

Plaintiff-Appellant, Thomas L. Blackburn, hereby gives notice that he appeals the decision of the Fourth Appellate Court of Appeals dated September 25, 1992, to the Supreme Court of Ohio. This Notice is filed in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. Appellant intends this motion to be a motion to certify the record, as provided in Rule II, Section 2, of the Rules of Practice of the Supreme Court of

Ohio. Counsel for appellant below was Gerlach, Gerlach, & Gerlach, and Mrs. Cynthia Gerlach. Counsel for appellee below was McCurdy, Johnson, Ruggiero, McKenzie, and Bender, and Stanley C. Bender.

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff
0029669
618 Chilliothe Street
Portsmouth, Ohio 45662
Phone 614/354-5297

PROOF OF SERVICE

This is to certify that on the 19th Day of October, 1992, and pursuant to Rule I(B) of the Rules of practice of the Supreme Court of Ohio, a true and correct copy of the foregoing Notice of Appeal was mailed, to Stanley C. Bender, Attorney for Defendant-Appellee, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff

THE SUPREME COURT OF OHIO

1993 TERM

To wit: February 10, 1993

Thomas L. Blackburn, Appellant,	:	Case No. 92-2306
v.	:	ENTRY
Rebecca Tudor, Appellee.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Scioto County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Thomas Blackburn.

(Court of Appeals No. 2021)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 92-1714

Thomas L. Blackburn,

Petitioner

v.

Rebecca L. Tudor

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Ohio, Scioto County, No. 2021.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of Ohio, Scioto County.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

June 14, 1993

A true copy WILLIAM K. SUTER
Testi
Clerk of the Supreme Court of the United States
By _____
Deputy

PURCHASE AGREEMENT
PHYLLIS ESTEP REALTY

ESTEP
Realty

8077 Gallia Street, CB49-04
Wheelersburg, Ohio 45694
Phone (614) 574-2537

Wheelersburg, Ohio 4-26, 1993.

In consideration of the mutual promises herein contained, Becky Tudor the owners agree to sell and convey; and Stephen and Beverly Boehm, the buyers, agree to purchase and pay for the following described Real Estate _____ Twp. Scioto, County 5270 Oakland Ave. Sciotoville, Oh together with all improvements appurtenances, rights, privileges, and easements thereinto belonging but subject to all zoning, restrictions, easements, and conditions of record.

The following conditions shall prevail:

1) Purchase price shall be $88,000.

2) Deposit shall be $50.00

3) Taxes shall be prorated to date of closing unless other wise agreed in writing prorated

4) Sale is to be consummated within ____ days with closing on or before See below contingencies subject to the title defect provision below.

5) Type of financing shall be Conventional

6) Possession shall be 30 days after the closing.

7) Chattels included with the sale are Draperis and window treatments, Dinette in breakfast area, bar stools

at wet bar, riding lawnmower, existing light fixtures, range

8) Sale contingencies and dates there of are: Contingent upon buyers selling their home.

The receipt of $50.00 is hereby acknowledged by the owner as part payment on the purchase price and is to be held by Phyllis Estep Really in a trust account until sale is consummated.

Seller shall deliver to purchaser a good and sufficient warranty deed with appropriate release of dower conveying a good and marketable title to subject premise, free and clear of all liens and encumbrances whatsoever. Purchaser shall provide his own title examination, *if the seller's title is found defective, the defect shall be remedied within 90 days or all monies returned to purchaser.*

It is expressly understood and agreed by the purchaser and the seller that all representations relating to the above properly made by Phyllis Estep Realty or any agent of said company were based upon information furnished by the purchaser or seller and said company shall not be liable for the incorrectness of any such information. Purchaser agrees to accept property and improvements in present physical condition, either known, unknown or hidden, after examination by the undersigned purchaser prior to the closing.

It is understood and agreed that after signing this agreement, if any buildings or other improvements are substantially damaged or destroyed prior to the delivery of the deed, purchaser shall have the option of accepting the proceeds of any insurance payable as a result of such damage or destruction, or of terminating this agreement

within 15 days of occurance. Seller, however, shall keep the property adequately insured against fire prior to the delivery of deed to purchaser, who shall then have responsibility of all insurance.

The parties hereto agree to save Phyllis Estep Realty, its agents and/or employees harmless from any and all liabilities resulting from this transaction. Time is of the essence in all provisions of this contract.

The purchaser and seller each hereby acknowledge receipt of a copy of the offer and acceptance. This document is a binding contract by law, if, after signing, either buyer or seller defaults in consummation, such defaulter will be liable to Phyllis Estep Realty for its 7% commission on the purchase price. All parties are recommended to seek legal counsel with regard to this contract.

Purchaser – We hereby agree to purchase the above described property under terms and conditions contained herein. This offer to be accepted within 2 days from the above date.

	Address	Phone	Date
/s/ Steve Boehm			
	77 Moundview		
	Av Ports	354-4861	4-26-93
/s/ Beverly Boehm			
	77 Moundview		
	Av Ports	354-4861	4-26-93

Seller – We hereby accept the above offer made through Phyllis Estep Realty and agree to pay the ___ commission of the above sale price and also agree that this contract supersedes any pass agreement or contract.

Address Phone Date

Rebecca C. Tudor subject to counter offer 4-27-93

Phyllis Estep Realty

By _____

EXHIBIT "B"

THE COURT OF APPEALS OF OHIO
IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN,
Plaintiff-Appellant

VS.

REBECCA TUDOR,
Defendant-Appellee

Case No. 93-CA-2150
(Related Case 2021)

APPELLANT'S RESPONSE TO MOTIONS

(Filed June 25, 1993)

Comes Appellant, by and through counsel, and responds to the motions filed by appellee. Appellee has filed two motions, one seeking dismissal of the within appeal and an award damages for delay, and the second motion seeks an order requiring appellant to post a bond, pending appeal. Both motions should be overruled. A memorandum appears below.

MEMORANDUM

Appellee's motions raise the issue of when the Revised Judgment Entry, filed by the trial court on October 16, 1992, became a final appealable judgment. The statutes involved, R.C. 2505.02 and R.C. 2505.03 clearly indicate that the judgment entered by the trial court on October 16, 1992 was not a final appealable judgment. Appellant had the right to file a notice of appeal to the

Supreme Court, if this was done within the thirty day period allowed by Rule 1, Section 1(A) of the Rules of Practice of the Supreme Court of Ohio. It was done, and appellee admits that in the motion to dismiss. The Revised Judgment Entry did not become a final appealable judgment, after the Supreme Court of Ohio denied the appeal, either. Appellant has the right to file a Petition For A Writ Of Certiorari. Appellant timely filed that Petition, as allowed by Rule 10.1(b) of the Rules of the Supreme Court and by 28 USC 1257. And, appellee admits that in the motion to dismiss. As is contemplated by R.C. 2505.02 and R.C. 2505.03 "other laws" kept the Revised Judgment Entry from becoming a final appealable judgment until after the U.S. Supreme Court overruled the Petition. That occurred on June 14, 1993. Appellant's Notice of Appeal, as to the Revised Judgment Entry, was filed within the thirty (30) day period allowed by Rule 4(A), Rules of Appellant Procedure. The same is true, with respect to the judgment entry overruling appellant's motion for relief from judgment, which is also attached to the motion to dismiss.

At all times, prior to the U.S. Supreme Court's disposition of the petition, the Revised Judgment Entry was prematurely entered and the judgment overruling the Civ.R. 60(B) motion was not yet final. See, generally, *Klein v. Bendix-Westinghouse Co.*, 13 O.S.2d 85, 42 O.S. 2d 283, 234 N.E.2d 587, *In re Mahoning Valley Sanitary District*, 161 O.S. 259, 53 O.S. 140, 119 N.E.2d 61, and *In re Wisner*, 148 O.S. 31, 34 O.S. 558, 72 N.E.2d 751. Appellant's Notice of Appeal is not, therefore, frivolous. No damages should be awarded to appellee.

And, appellant should not be required to post a bond, in order to proceed with this appeal. The statute involved, R.C. 2703.26, prohibits the sale of real estate, while that real estate is involved in litigation. The statute does not require an appellant to post a bond, pending appeal. Exhibit G, which is attached to appellee's motion to dismiss, shows that the sales contract was entered into while the Petition For A Writ Of Certiorari To The Supreme Court Of Ohio, was still pending in the Supreme Court of the United States. According to the statute, appellee should not have entered into such a contract for sale, while the petition was pending.

WHEREFORE, for the reasons set forth above, both the motion to dismiss and the motion to post bond should be overruled.

Respectfully submitted,

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach

Cynthia Koehler Gerlach
Attorney for Plaintiff
0029669
814 7th Street
Portsmouth, Ohio 45662
Phone 614/354-7755

CERTIFICATE OF SERVICE

This is to certify that, on the 25th day of June, 1993, a copy of the foregoing Appellant's Response to Motions was mailed, postage prepaid to Mr. Stanley C. Bender, Attorney for Defendant, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

/s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff

EXHIBIT "C"

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

THOMAS L. BLACKBURN	:	
Plaintiff-Appellant	:	**CASE NO. 93 CA 2150**
V.	:	
REBECCA TUDOR	:	**ENTRY**
Defendant-Appellee	:	**(Filed July 21, 1993)**
	:	

Upon consideration of the motion of appellee to dismiss, and the memorandum contra of the appellant, the court finds that the notice of appeal was filed more than thirty (30) days after the entry of the order appealed, and that this court does not have jurisdiction to consider this appeal.

This appeal is therefore dismissed and the costs assessed to the appellant.

For the Court:

Grey, J., Concurs:
Abele, J., Dissents:

/s/ Earl E. Stephenson
Earl E. Stephenson, Judge

EXHIBIT "D"

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

SCIOTO COUNTY

THOMAS L. BLACKBURN	:	
Plaintiff-Appellant	:	**CASE NO. 93 CA 2150**
V.	:	
REBECCA TUDOR	:	**ENTRY**
Defendant-Appellee	:	**(Filed Nov. 9, 1993)**
	:	

Upon consideration of the motion of appellant for reconsideration of the dismissal of this appeal and the memorandum of the appellee, the court finds appellant's motion to reconsider not well taken.

Appellant's motion to reconsider is therefore denied.

Stephenson, J., Concurs:
Grey, J., Dissents:

/s/ William H. Harsha
William H. Harsha
Presiding Judge

EXHIBIT "E"

IN THE SUPREME COURT OF OHIO
AT
COLUMMBUS [sic], OHIO

THOMAS L. BLACKBURN **Plaintiff-Appellant**	**Case No. 93-2424**
VS.	**PLAINTIFF'S NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**
REBECCA TUDOR **Defendant-Appellee**	

Plaintiff-Appellant, Thomas L. Blackburn, hereby gives notice that he appeals the decision of the Fourth Appellate Court of Appeals dated November 9, 1993, to the Supreme Court of Ohio. This Notice is filed in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. Appellant intends this motion to be a motion to certify the record, as provided in Rule II, Section 2, of the Rules of Practice of the Supreme Court of Ohio. Counsel for appellant below was Gerlach, Gerlach, & Gerlach, and Mrs. Cynthia Gerlach. Counsel for appellee below was Stanley C. Bender.

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff
0029669
814 7th Street
Portsmouth, Ohio 45662
Phone 614/354-7755

PROOF OF SERVICE

This is to certify that on the 29th Day of November, 1993, and pursuant to Rule I(B) of the Rules of practice of the Supreme Court of Ohio, a true and correct copy of the foregoing Notice of Appeal was mailed, to Stanley C. Bender, Attorney for Defendant-Appellee, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff

EXHIBIT "F"

IN THE SUPREME COURT OF OHIO
AT
COLUMBUS, OHIO

THOMAS L. BLACKBURN, Case No. 93-2424

Plaintiff-Appellant

VS.

REBECCA TUDOR,

Defendant-Appellee

APPELLANT'S BRIEF IN SUPPORT OF JURISDICTION

CYNTHIA KOEHLER GERLACH
814 Seventh Street
Portsmouth, Ohio 45662
Attorney for Plaintiff-Appellant

STANLEY C. BENDER
P. O. Box 950
Portsmouth, Ohio 45662
Attorney for Defendant-Appellee

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R.C. 2305.29 ..... 6,7 & 9

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Civ.R. 60(B) 4,7

Civ.R. 12(H) 7

I. INTRODUCTION

Plaintiff-Appellant, Thomas L. Blackburn, hereby presents his brief in support of jurisdiction, pursuant to Rule II, Section 4 of the Rules of Practice of the Supreme Court.

This is an appeal from a judgment rendered by the Court of Appeals for the Fourth Appellate District of Ohio. A copy of the judgment appears in the appendix hereof, as Exhibit A and Exhibit A-1. The case originated in the Scioto County Court of Common Pleas. Assertion of jurisdiction over this case is of interest to the bench and bar because of the unusual proceedings below. As

explained more fully below, the proceedings below consisted of a judgment being entered before the time for appeal to this Court expired. An opinion on the issues presented by this appeal will clarify the jurisdictional authority of the trial court, after a court of appeals has remanded the case to that court, with instructions. Instruction to the bench and bar is desperately needed, so that proper protection of the client's interest can be had.

II. STATEMENT OF THE CASE AND OF THE FACTS

The parties were engaged to be married. Appellee, for no good cause, terminated the engagement. While engaged, appellant purchased real property, to be given to appellee when they married. A deed was prepared conveying this property to appellee and placed with an escrow agent. After terminating the engagement, appellee surreptitiously recorded the deed. When appellant discovered this, he filed an action in the Scioto County Court of Common Pleas. The action came on for trial. Judgment was rendered favoring appellee. Appellant appealed to the Court of Appeals for the Fourth Appellate District.

The Appellate Court, on September 25, 1992, found that the trial judge had allowed improper evidence to be introduced into the case, vacated the judgment, and remanded the case to the trial court with instructions for the trial judge to consider the case without the improper evidence. On October 16, 1992, the trial judge entered a "Revised Judgment Entry," reinstating his original decision. A copy of the judgment appears in the appendix hereof, as Exhibit B. Appellant then timely appealed the decision of the appellate court to this Court. After this

Court denied the motion to certify the record, appellant timely filed a Petition for a Writ of Certiorari to the U.S. Supreme Court. The petition was denied.

A motion to stay enforcement of the revised judgment was filed contemporaneously with the Brief in support of jurisdiction, and was overruled. A similar motion contemporarily filed in the appellate court and was also overruled. A motion subsequently filed in the trial court, pursuant to Civ.R. 60(B), was also overruled. The revised judgment was, therefore, left unresolved until appellant's Writ of Certiorari was denied. Appellant, within thirty days, filed a notice of appeal with the appellate court for the Fourth Appellate District. On appellee's motion, that court dismissed the notice of appeal, saying that it was filed later than thirty days of the date of the judgment. Appellant timely filed for reconsideration, nothing that, since, at all times the trial court was without subject matter jurisdiction to enter the revised judgment, thirty days after the judgment became effective had not expired, when the notice of appeal was filed. The notice of appeal was, therefore, timely filed. The appellate court has now overruled this motion, as well.

On November 29, 1993, appellant filed his notice of appeal to this Court, in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. A copy of the notice appears in the appendix hereof, as Exhibit C.

On Exhibit A, Judgment Entry filed July 21, 1993, Judge Abele dissents. On Exhibit A-1, Judgment Entry filed November 9, 1993, Judge Grey dissents.

III. ARGUMENT

Proposition of Law No. 1:

A case remanded from a Court of Appeals to the trial court deprives the trial court of subject matter jurisdiction-when.

Authorities cited in support of proposition of Law No. 1:

R.C. 2703.26 and R.C. 2305.29; App.R. 4(A).

Appellant had the right to appeal the judgment of the court of appeals, by filing his motion to certify the record in the Supreme Court of Ohio. Appellant timely filed that motion. Having done so, the trial court was required to await the decision of the Supreme Court of Ohio, prior to taking action, other than ruling on the motion from relief from the revised judgment, over which it had no subject matter jurisdiction to enter. By statute, the court of appeals retained jurisdiction of the case, for a period of thirty days, in order that the appellant may have time to file an appeal to the Supreme Court of Ohio. Before the thirty day period expired, however, the trial court entered the Revised Judgment Entry. This was premature, because at the time the trial court did not have subject matter jurisdiction. Even after this Court denied jurisdiction, appellant had the right to file a petition with the U.S. Supreme Court. The judgment of this Court was not final until at least thirty days, in order that appellant may have had time to file his petition. Again, the trial court was obligated to await the decision on the petition for a Writ of Certiorari, before acting. Once the U.S. Supreme Court's decision was final, the thirty day time period

began to run, respecting finality of the Revised judgment. Appellant filed his notice of appeal with the appellate court, within this thirty day period. See generally, App.R. 4(A), R.C. 2703.26, and R.C. 2305.29.

It is a matter of established law, that the trial court, at its discretion, may void a judgment that it had no subject matter jurisdiction to enter. See, generally, Civ R. 12(H). Appellant timely filed a motion in the trial court, pursuant to Civ.R. 60(B), seeking to have the Revised Judgment Entry vacated, in view of his timely appeal to the Supreme Court of Ohio. This appeal was denied. Clearly, the Civ. R. 60(B) motion should have been sustained, albeit, the Civ.R. 60(B) motion related more appropriately to relief from the judgment, rather than a mere challenge to the subject matter jurisdiction of the trial court to have entered the judgment, prematurely. Such motions are commonly filed in this manner. The judgment was voidable. There appears no other vehicle in the rules of civil procedure to obtain relief from a voidable judgment, other than to call attention to the voidable judgment, by means of a motion pursuant to Civ.R. 60(B).

By prematurely entering its judgment, and refusing to relieve appellant of the same, the trial court appears to have supplanted certain statutory and constitutional rights that appellant had, with respect to the right to appeal an appellate judgment. It cannot be contradicted that appellant had the right to file a motion to certify the record in this Court, if it were done timely, as it was in this case. There is equally no contradiction that appellant had the right to file a Writ of Certiorari to the U.S. Supreme Court, after his appeal to the Supreme Court of Ohio had been denied. The trial court's actions, coupled

with that of the court of appeals, make these rights unclear. For these reasons, either the trial court should have granted the motion or the appeal should have been allowed to proceed. Either of these would have avoided the quagmire that now makes advice, when this situation obtains, so uncertain.

IV. REASON THAT ASSERTION OF JURISDICTION IS OF INTEREST TO THE BENCH AND BAR

The within matter is of great interest to the bench and bar because of the unusual procedural means by which the "Revised Judgment Entry" became of record. The general practitioner, as a rule, expects that the procedure for processing an appeal through the various courts is straightforward. The procedure is not expected to have pitfalls, which do not appear to be comprehended by the statutes and rules relating to appellate procedure. No examination of the rules of appellate procedure, R.C. 2703.26, or R.C. 2305.29, alerts the practitioner that the trial court can intervene, while a judgment is within the time period to appeal to the Supreme Court of Ohio or to the U.S. Supreme court, and conclude the case, unless an appeal is taken from this "interloper judgment." The obvious answer is for the appellant to immediately appeal the trial court's intervention judgment. But to do this, the remaining appeals available to the appellant must be abridged.

The generally recognized maxim is that, as to one cause of action, one action should be in progress, at a time. In the within action, the action pending was that which was to be filed before the Supreme Court of Ohio,

and later before the U.S. Supreme Court. It would clearly be unseemly that an appellant would have an appeal in two separate appellate courts, at the same time, on the same subject matter. Such an aberrant intervention as obtained in the case *sub judice* must be used to explain to the bench and bar; that the trial court has such jurisdiction, what the proper advice to a litigant should be, with respect to his putative remaining appeal rights, and that the same should be planned for, when appeal strategy is being considered.

It cannot be overlooked in this case that the trial court took its action *sua sponte.* Neither party served on the other a motion for the trial court to take the action that it did. The only motions made in connection with the disposition of this case occurred after the U.S. Supreme Court denied the Writ of Certiorari. After the notice of appeal was filed, appellee filed a motion to dismiss the appeal as untimely filed. Without explanation, the court of appeals erroneously granted the motion. Appellant timely filed a motion for reconsideration; and, it was overruled. It seems unfair and unconstitutional that appellant had to decide to abridge his rights to the remaining appeals, the appellant decision extant, in order to be procedurally correct, with respect to the "Revised Judgment Entry." Sanctioning of this procedure would be of interest to all practitioners.

VI. CONCLUSION

This matter should be remanded to the Court of Appeals for the Fourth Appellate District, for consideration of the full appeal.

WHEREFORE, for the reasons set forth above, appellant prays that this Court assert its jurisdiction over this matter.

Respectfully submitted,

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff
0029669
814 7th Street
Portsmouth, Ohio 45662
Phone 614/354-7755

CERTIFICATE OF SERVICE

This is to certify that, on December 20th, 1993, and pursuant to Rule 1(B) of the Rules of Practice of the Supreme Court of Ohio, a true and correct copy of the Foregoing Brief in Support of Jurisdiction was mailed, postage prepaid to Mr. Stanley C. Bender, Attorney for Defendant, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

/s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff

APPENDIX AND ITS CONTENTS

Decision of the Court of Appeals for the Fourth Appellate District and Judgment Entry dated July 21, 1993 ..... Exhibit A

Decision of the Court of Appeals for the Fourth Appellate District and Judgment Entry dated November 9, 1993 ..... Exhibit A-1

Revised Judgment of the Scioto County Court of Common Pleas ..... Exhibit B

Notice of Appeal to the Ohio Supreme Court Exhibit C

Exhibit A

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

SCIOTO COUNTY

THOMAS L. BLACKBURN Plaintiff-Appellant	:	CASE NO. 93 CA 2150
v.	:	ENTRY
REBECCA TUDOR Defendant-Appellee	:	(Filed July 21, 1993)

Upon consideration of the motion of appellee to dismiss, and the memorandum contra of the appellant, the court finds that the notice of appeal was filed more than thirty (30) days after the entry of the order appealed, and that this court does not have jurisdiction to consider this appeal.

This appeal is therefore dismissed and the costs assessed to the appellant.

For the Court:

Grey, J., Concurs:
Abele, J., Dissents:

/s/ Earl E. Stephenson
Earl E. Stephenson, Judge

EXHIBIT A-1

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

THOMAS L. BLACKBURN Plaintiff-Appellant v. REBECCA TUDOR Defendant-Appellee	: : : : : : :	CASE NO. 93 CA 2150 ENTRY (Filed Nov. 9, 1993)

Upon consideration of the motion of appellant for reconsideration of the dismissal of this appeal and the memorandum of the appellee, the court finds appellant's motion to reconsider not well taken.

Appellant's motion to reconsider is therefore denied.

Stephenson, J., Concurs:
Grey, J., Dissents:

/s/ William H. Harsha
William H. Harsha
Presiding Judge

"EXHIBIT B"

IN THE COURT OF COMMON PLEAS

SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN, PLAINTIFF,

-vs-

REBECCA L. TUDOR, Defendant.

CASE NO. 91-CI-136

REVISED JUDGMENT ENTRY

(Filed Oct. 16, 1992)

* * *

This cause comes on to be heard upon a Mandate from the Court of Appeals as follows:

"In that we have sustained Appellant's first assignment of error, the Judgment is reversed and remanded to the Trial Court for a redetermination of Appellant's Complaint without considering the evidence it took Judicial Notice of concerning Appellant's former Trial."

There was no intention of the Common Pleas Court, hearing the facts in this case, to rely upon any evidence in the Appellant's former Divorce Trial as it is completely unnecessary to a Judgment in this case. An examination of Appellant's testimony in this case, on Cross Examination, reveals a pattern of deception both to his wife and also to his new girlfriend, who didn't know that he had two deeds made to the property. In *this* case he affirmed that he had previously under oath, denied any ownership in the property. It is also undisputed that the Appellant is not in the chain of title of the property. Therefore, I

reaffirm my previous decision based solely upon the facts of this case as follows:

1. The Appellant was not entitled to legal relief not being in the chain of title (by his own choosing).

2. Under the facts of this case and by any existing maximum of equity, he did not have clean hands and was not entitled to equitable relief.

/s/ Thomas W. Mitchell
THOMAS W. MITCHELL, JUDGE
SITTING BY ASSIGNMENT
COMMON PLEAS COURT
SCIOTO COUNTY, OHIO

EXHIBIT C

IN THE SUPREME COURT OF OHIO
AT
COLUMBUS, OHIO

THOMAS L. BLACKBURN Plaintiff-Appellant	PLAINTIFF'S NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO
VS.	
REBECCA TUDOR Defendant-Appellee	

Plaintiff-Appellant, Thomas L. Blackburn, hereby gives notice that he appeals the decision of the Fourth Appellate Court of Appeals dated November 9, 1993, to the Supreme Court of Ohio. This Notice is filed in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. Appellant intends this motion to be a motion to certify the record, as provided in Rule II,

Section 2, of the Rules of Practice of the Supreme Court of Ohio. Counsel for appellant below was Gerlach, Gerlach, & Gerlach, and Mrs. Cynthia Gerlach. Counsel for appellee below was Stanley C. Bender.

GERLACH, GERLACH & GERLACH

By /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff
0029669
814 7th Street
Portsmouth, Ohio 45662
Phone 614/354-7755

PROOF OF SERVICE

This is to certify that on the 29th Day of November, 1993, and pursuant to Rule I(B) of the Rules of practice of the Supreme Court of Ohio, a true and correct copy of the foregoing Notice of Appeal was mailed, to Stanley C. Bender, Attorney for Defendant-Appellee, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

BY /s/ Cynthia Koehler Gerlach
Cynthia Koehler Gerlach
Attorney for Plaintiff

EXHIBIT "G"

THE SUPREME COURT OF OHIO

1994 TERM

To wit: February 9, 1994

Thomas L. Blackburn, Appellant, v. Rebecca Tudor, Appellee.	:	Case No. 93-2424 ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Scioto County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Thomas L. Blackburn.

(Court of Appeals No. 93CA2150)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

EXHIBIT "H"

THE SUPREME COURT OF OHIO

1994 TERM

To wit: March 30, 1994

Thomas L. Blackburn, Appellant,	:	Case No. 93-2424
	:	REHEARING ENTRY
v.	:	(Scioto County)
Rebecca Tudor, Appellee.	:	

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 93CA2150)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice